

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ABINGDON DIVISION**

Defendant Walter Lefight Church has filed a motion seeking a mistrial on due

process grounds based on the reliability of a witness' in-court identification of Church and the government's inconsistent positions as to that testimony. Having reviewed the pertinent authority and the evidence in question, I deny the defendant's motion.

## I

The defendants Charles Wesley Gilmore and Walter Lefight Church are charged with various federal crimes arising out of the murders of Robert Davis, his wife and stepson on April 16, 1989, at their home in Pocahontas, Virginia. The original indictment, returned December 13, 2000, charged Church and Samuel Stephen Ealy with the killings. In 1991 Ealy had been tried in state court for the murders and acquitted. In the subsequent federal prosecution, Ealy was tried before Church and was convicted and sentenced to life imprisonment. Church was thereafter tried, but the jury was unable to reach a unanimous verdict, and a mistrial was declared. Before Church's second trial was to begin, the government obtained a Superceding Indictment, adding Gilmore as a defendant. Defendant Sheri Lynn Howell Nichols was indicted separately by the government for allegedly providing perjurious testimony at Church's first trial. I consolidated the cases for trial, which is presently ongoing.

At Ealy's state and federal trials, his counsel presented evidence that Church, not Ealy, was responsible for the murders. At both trials, Ealy called a friend named

Ronnie Mills as a witness to testify that on several consecutive days before the murders, he saw a then-unknown man sitting in a blue car with West Virginia plates on the road to the Davis house, the implication being that a person other than Ealy was planning the murders. At Ealy's state trial, Ealy's counsel presented a stipulated photograph of Church to the witness and Mills testified that it was the man who he had seen in the blue car:

Q. I want to show you this photograph and ask you if the person you saw in that vehicle resembled Pete Church?

A. It does except for the beard.

Q. Other than the beard, is there any difference?

A. No, sir.

(Ealy State Trial Tr. 1337.)

At Ealy's federal trial, no mention was made of Church during Mills' testimony, although the federal prosecutor cross-examined Mills and elicited answers intended to minimize the importance of his testimony, as follows:

Q: This your house down here?

A: Uh-huh.

Q: Davis house in here?

A: Uh-huh.

Q: Where was this car?

A: This car was right here in this curve, right here.

Q: So, wasn't anywhere close to Merrick Lane, went on Merrick Lane?

A: Maybe 300 yards, something. Right here coming up this way. The Catholic church is back in behind on this curve here somewhere.

Q: Can't even see the Davis house from here, can you?

A: No.

Q: You don't know who was in the car, you don't know what the car was there for, you don't know who he was visiting. Are there other houses in that area, Mr. Mills?

A: No, not going up through there.

Q: There are a lot closer houses to where that car was than the Davis house, right?

A: Down over the hill.

Q: Okay. Don't know who was in the car? You just saw the one person?

A: Just one person.

Q: Do you know who was in the car?

A: No, sir.

(Ealy Fed. Trial Tr. vol. XII 72-73.)

At Church's first trial, the federal prosecutor called Mills as part of the government's case against Church. He testified as he had in Ealy's state trial. On cross examination by Church's counsel, Mills stated that Church, then present in the courtroom as the defendant, "favor[ed]" the man in the blue car, but that he could not be sure. (Church Trial Tr. vol. VIII 88.)

In the present retrial, the government again called Mills as a witness. This time, Mills identified Church as follows:

Q Do you recognize the person you saw in that vehicle that day in the courtroom here?

A. Yes, sir.

Q Can you point him out to the jury, please?

A. The second man from the right.

Mr. GIORNO: Let the record reflect he's identified the defendant, Walter Pete Church.

THE COURT: Yes, sir.

Church did not object to Mills' testimony at the time, but later filed the present motion for a mistrial.

## II

This is not the first time that Church has claimed that the government has denied him due process by taking inconsistent positions in its prosecution of him and Ealy for the Davis family murders. *See United States v. Church*, No. 1:00CR00104, 2002 WL 31095012 (W.D. Va. Sept. 18, 2002). There are situations where the Due Process Clause prohibits the government from presenting “mutually inconsistent theories of the same case against different defendants.” *United States v. Higgs*, 353 F.3d 281, 326 (4th Cir. 2003) (holding that government could argue that defendant was more culpable than his accomplice, though it had previously argued that they were partners in crime at accomplice’s earlier trial). “For example, due process may be violated if ‘an inconsistency . . . exist[s] at the *core* of the prosecutor’s cases against defendants for the same crime,’ or where the evidence used at the two trials is factually inconsistent and irreconcilable.” *Id.* (citations omitted) (alteration in original). No such inconsistency exists in the present case.

From the beginning of the government’s prosecution of Ealy and Church for these murders, and to the present, the government has consistently asserted one theory of the case—that both defendants were hired by the drug kingpin, Gilmore, to kill Robert Davis because Gilmore feared that Davis might inform on him; that both defendants planned and executed the killing of Davis at his home and then killed Mrs.

Davis and her son because they were present and witnessed the murder of Robert Davis. The fact that the prosecution has changed its position as to the relevance and reliability of Mills' testimony by first questioning it at Ealy's federal trial when it was presented by his counsel and then presenting it in support of its case at Church's second trial, does not constitute a core inconsistency. *See United States v. Hozian*, 622 F.2d 439, 442 (9th Cir. 1980) (holding that government could present the testimony of convicted defendant in later trial of accomplice even though the defendant had asserted his innocence at his own trial and his testimony had been impeached by the government).

Because from the beginning of this prosecution, during Ealy's trial, Church's first trial, and Church's second trial, the government has consistently asserted one theory of the case, I will deny Church's motion for a mistrial.

### III

Church also argues that Mills' in-court identification of Church was unreliable, should not have been admitted, and therefore its admission creates grounds for a mistrial.

The law on excluding in-court identifications applies only to situations where the in-court identification has been tainted by impermissibly suggestive identification

procedures. *See Neil v. Biggers*, 409 U.S. 188, 198 (1972) (“Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.”). When a defendant claims that his due process rights were violated by an identification procedure, “First, the court examines whether the initial identification was impermissibly suggestive. Second, even if the procedure was suggestive, the in-court identification is valid provided the identification is reliable.” *United States v. Johnson*, 114 F.3d 435, 441 (4th Cir. 1997). Church fails to allege that Mills was subject to any impermissibly suggestive identification procedure. Instead, his argument is based upon the second part of the analysis, but that question is relevant only to determine whether the in-court identification may still be reliable, and therefore admissible, despite the improper identification procedure. *Id.*

If Church believes that Mills’ identification is unreliable for other reasons—because, for example, Mills may not have had sufficient opportunity to accurately view the man he saw parked near the Davis residence—he had sufficient opportunity to address those issues during cross-examination. Indeed, Church’s counsel did extensively cross-examine Mills regarding the reliability of his identification of Church as the man parked in the vicinity of the Davis residence on the days before the



murders. Defense counsel questioned Mills about his relationship with Ealy and his sympathy toward Mr. Davis, as well as his view of the car and its proximity to the Davis residence as opposed to other residences. Church's counsel also read portions of the prosecutor's prior cross-examination of Mills at Ealy's federal trial into the record.

While it is true that Mills' testimony identifying Church as the man he saw near the crime scene in 1989 has differed in its strength from trial to trial, from "no difference except for the beard" to "favor[ed] but not sure" to "recognized in the courtroom," defense counsel cross examined the witness at length as to these apparent inconsistencies.

Because Church has not pointed to any allegedly impermissible conduct related to Mills' identification of Church, I will deny his motion.

#### IV

For the foregoing reasons, it is **ORDERED** that defendant Church's motion for a mistrial on due process grounds [Doc. No. 1180] is DENIED.

ENTER: March 12, 2004

/s/ JAMES P. JONES  
United States District Judge